

IN THE UNITED STATES DISTRICT COURT
FOR THE DISTRICT OF MARYLAND

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| DIAGNOSTIC RESOURCE GROUP, L.L.C. | * | |
| PLAINTIFF | * | Case No.: L-02-CV-3020 |
| VS. | * | (removed from Baltimore County |
| TOSHIBA AMERICA MEDICAL | * | Circuit Court- case #03-C-02- |
| SYSTEMS, INC. | | 006016) |
| DEFENDANT | * | |
| | * | |

MOTION TO PRECLUDE SPECIFIC DEFENSE ALLEGATION

_____Now comes Plaintiff, Diagnostic Resource Group, L.L.C., by its counsel, Samuel Sperling and the Law Office of Leonard J. Sperling, and respectfully prays that the Defendant be precluded from asserting a certain defense, and for reasons in support thereof states:

1. That the essential allegation of this case is that the Defendant Toshiba had a promissory obligation to fix an OPART scanner leased by Plaintiff during the July 4, 1999 holiday and failed to do so;
2. That at the time of the events in question, the Defendant indicated to the Plaintiff that it would not repair the said scanner as Defendant asserted that the repair period (one year) had lapsed, while the Plaintiff asserted that the repair period was still ongoing;
3. That at no time during the relevant time frame of the events in question did the Defendant ever assert that it had no obligation to repair the scanner as the part that had failed had not been manufactured by Toshiba, the Defendant;
4. That the sole assertion raised by Defendant at the relevant time period was that the Defendant alleged that the repair period had lapsed and in fact the Defendant at no time asserted that the

- parts that had malfunctioned were not covered by the original Toshiba promise to repair;
5. That Plaintiff, in reliance upon its view of the situation, namely that it felt that the repair period had not lapsed, acted according to that belief in reliance upon the Defendant's contentions and reasonably relied upon that understanding in its further course of conduct;
 6. That therefore the Defendant Toshiba is equitably estopped from now asserting that it never had an obligation to repair the said equipment that failed on that date as the said equipment was not manufactured by Toshiba itself;
 7. That in fact the Defendant had repaired those items of equipment prior to the occurrence of July, 1999, and thus Plaintiff further had the right to believe that the said item was an item that would be repaired by the Defendant during the repair period;
 8. Defendant has never specifically indicated that it intended to utilize this claim in defense, and indeed in oral argument before the Court in March, 2003 did imply that this was not its contention;
 9. Plaintiff contends that based upon the construction of the language of the agreement and based upon the course of conduct of the Defendant the Defendant was in fact required to repair or replace the equipment even if not manufactured by Toshiba, and Defendant has not contradicted this position through its responses in discovery, its answer to the Complaint and its various filings;

10. However, Plaintiff asserts that the Defendant is further equitably estopped from now asserting this defense for the first time on Motion for Summary Judgment when it was not in fact raised at the time of the events in question or in the discovery process;

Respectfully Submitted,

Samuel Sperling
Law Office of Leonard J. Sperling
1777 Reisterstown Road
Commercentre West
Suite 212
Baltimore, Maryland
21208
410-653-0141
Counsel for Plaintiff
Federal Bar Number SS24135

PRAYER FOR HEARING

_____Plaintiff respectfully prays that this matter be set in for a hearing before this Honorable Court.

Samuel Sperling

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| SYSTEMS, INC. | | |
| | * | |
| DEFENDANT | * | |

CERTIFICATION OF MAILING

This is to certify that on this June 25, 2003, a copy of this pleading was sent by e-mail to Brooke R. Schumm, III, Esquire, Counsel for Defendant at bschumm@danmclaw.com.

Samuel Sperling
SS24135

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| | * | |

ORDER

_____ Upon consideration of the Motion to Preclude Specific Defense Allegation and any Response thereto:

IT IS HEREBY ORDERED:

this _____, 2003, by the United States District Court for the District of Maryland that the Motion shall be and is hereby GRANTED, and that Defendant shall not assert on Motion for Summary Judgment or trial that it had no obligation to effect the repair sought on or about July 5, 1999 due to the fact that the said part was not manufactured by Toshiba.

Judge

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| | * | |

AFFIDAVIT OF SAMUEL SPERLING

I am Samuel Sperling, a competent adult and counsel for Plaintiff in this action. Based upon my review of the pleadings, and documents raised in discovery, all facts set forth in this pleading are true and accurate.

Samuel Sperling